IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-418

EXPEDITIONS UNLIMITED ACQUATIC ENTERPRISES, INC.

and

NORMAN SCOTT,

Petitioners,

vs.

SMITHSONIAN INSTITUTION, *et al.*,

Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. PYNE
1000 Connecticut Avenue, NW
Suite 1010
Washington, DC 20036
Attorney for Petitioners

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Citations

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STATEMENT

On January 17, 1972, the District Court entered Summary Judgment in favor of Respondents, although no notice of the entry of judgment was given to any party. On November 20, 1972, Petitioner first learned of the entry of judgment. (Reply Appendix, at 2). On December 4, 1972, Petitioner filed a Motion to Vacate and Reenter the Judgment in order to preserve its right of appeal, which unopposed motion was denied on December 19, 1972. The Court of Appeals reversed on June 26, 1974. *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution,* 500 F.2d 808 (Reply Appendix, at 1-4). On July 31, 1974, the District Court vacated its order of January 17,

1972, and entered judgment in favor of Respondents. Notice of Appeal was filed on August 16, 1974.

REPLY ARGUMENT

The Jurisdictional Issue

Respondents raise in their Brief an issue which had been determined adversely to Respondents by the United States Court of Appeals for the District of Columbia Circuit on June 26, 1974, and had not been raised again until their response to the Petition for Writ of Certiorari. The issue is whether the Court of Appeals had jurisdiction to review the District Court's entry of Summary Judgment for defendants.

Pursuant to the mandate of the Court of Appeals, in their opinion of June 26, 1974, reproduced herein at Appendix 1-4, the District Court vacated its prior entry of judgment on July 31, 1974. It was that entry of judgment from which a Notice of Appeal was filed on August 16, 1974. Once vacated, the prior entry of judgment ceased to exist, and once entered, the judgment of July 31, 1974 was appealable.

Respondents state in their Brief that a motion under Rule 60(b) cannot be used to extend time for appeal "where a party has simply failed to learn of the entry of the judgment because of a Rule 77(d) violation," and that "[i]n the present case there are no unusual circumstances that would justify deviation from that rule." (Brief for the Respondents, at 8.) Their statements ignore the facts found by the Court of Appeals to justify such action in this case.[1]

[1]Two actions were filed between the parties on the same day. Reply Appendix, at 2. Neither party learned of the entry of judgment. *Id.* While engaged in discovery in the companion case, counsel discussed whether there had been a decision. *Id.* Since neither party knew of the entry of judgment, there was no reliance upon it by Respondent, nor a "free calculated, deliberate" choice not to appeal by petition. *Id.* at 3, citing *Ackerman v. United States*, 340 U.S. 193, 198 (1950). The Respondents were not prejudiced by the Appeal and Petitioner filed a motion to vacate the prior decision within a reasonable time. *Id.* at 4.

Therefore should this court wish to consider the issue of jurisdiction of the Court of Appeals, it should grant certiorari and permit full briefing of this issue. In the cases cited by Respondents, *Schlesinger v. Councilman*, 420 U.S. 738, 743 (1975); *Gutierrez v. Waterman Steamship Corp.*, 373 U.S.R206 (1963); and *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1944), the jurisdictional issue was confronted only after full briefing. The same practice should be followed here.

CONCLUSION

The Court should grant the Petition and reject Respondents' jurisdictional argument as having been rendered moot by the District Court's vacation of the January 17, 1972 entry of judgment, and its subsequent entry of judgment on July 31, 1974. Alternatively, the jurisdictional issue should be considered after briefs are filed on the issues involved.

Respectfully submitted,

JOHN J. PYNE
1000 Connecticut Avenue, N.W.
Suite 1010
Washington, D.C. 20036
(202) 872-8411
Attorney for Petitioners

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1297

EXPEDITIONS UNLIMITED AQUATIC ENTERPRISES, INC., ET AL, APPELLANTS

v.

SMITHSONIAN INSTITUTION, ET AL

Appeal from the United States District Court for the District of Columbia

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Decided June 26, 1974

John J. Pyne, for appellant.

N. Richard Janis, Assistant United States Attorney with whom *Harold H. Titus, Jr.*, United States Attorney at the time the brief was filed, and *John A. Terry*, Assistant United States Attorney were on the brief, for appellee.

Before: BAZELON, *Chief Judge*, LEVENTHAL, *Circuit Judge*, and SOLOMON,* *United States District Judge* for the District of Oregon

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Per Curiam: Expeditions Unlimited Aquatic Enterprises, Inc., and Norman Scott (appellants) filed an action for libel against the Smithsonian Institution, its regents, and Clifford Evans (appellees) on January 8, 1971. On the same day another action between the same parties was filed. On March 12, 1971, appellees filed a motion to dismiss or in the alternative for summary judgment. On December 13, 1971, the parties filed their final briefs and the court took the motion under advisement.

On January 17, 1972, the court entered summary judgment for appellees. Neither the appellants nor the appellees learned of the entry of judgment. While engaged in discovery in the companion case, counsel for the parties periodically discussed whether there had been a decision on the motion in this case. On November 20, 1972, in a conversation with the trial judge's clerk, counsel for appellants first learned that the order granting summary judgment in favor of appellees had been entered more than ten months earlier.

On December 4, 1972, appellants filed a motion to vacate and re-enter the summary judgment in order to preserve their right to appeal. The appellees did not oppose the motion. Nevertheless, the court denied it without opinion on December 19, 1972. Appellants filed a timely appeal.

Rule 60(b)(6) of the Federal Rules of Civil Procedure allows a district court to relieve a party from a final judgment for "any . . . reason justifying relief from the operation of the judgment." This section "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott* v. *United States*, 335 U.S. 601, 615 (1949).

Here none of the parties knew of the judgment until ten months after it had been entered. The clerk did not notify the parties of the entry of judgment as required under Rule 77(d) of the Federal Rules of Civil Procedure, nor did the trial judge follow the usual practice of sending the parties copies of the opinion or order granting summary judgment. The motion to vacate and re-enter the judgment was filed only two weeks after appellants learned that the judgment had been entered.

We recognize that Rule 77(d) provides that the failure of the clerk to notify a party of the entry of judgment does not extend the time within which the party may appeal. This rule is intended to preserve the finality of judgments. If the parties do not know of the entry of judgment, the winning party cannot rely on the judgment and the losing party cannot make a "free, calculated, deliberate" choice not to appeal. *Ackermann* v. *United States*, 340 U.S. 193, 198 (1950). In these circumstances the purposes behind Rule 77(d) would not be served by denying the losing party the privilege of appealing and, in our view, justice demands that the losing party be given that opportunity.

Although several cases in this circuit have held that a motion to vacate and re-enter a judgment under Rule 60(b) cannot be used to extend the time for appeal, the facts in those cases are distinguishable. In *Lord* v. *Helmandollar*, 348 F.2d 780 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 928 (1966), local counsel received notice of the entry of judgment but out-of-state counsel did not. The negligence of local counsel and not the failure of the clerk or the court resulted in the failure to timely appeal. In *Hodgson* v. *United Mine Workers*, 473 F.2d 118, 124, 125 (D.C. Cir. 1972), appellant moved to vacate the judgment under Rule 60(b) even though he could have sought a thirty-day extension of time to appeal. Fed. R. App. P. 4(a). In each case counsel

knew of the entry of judgment in time to perfect an appeal under the Rules.[1]

We believe that a trial court may vacate and re-enter a judgment under Rule 60(b) to allow a timely appeal when neither party had actual notice of the entry of judgment, when the winning party is not prejudiced by the appeal, and when the losing party moves to vacate the judgment within a reasonable time after he learns of its entry. *Smith* v. *Jackson Tool & Die, Inc.*, 426 F.2d 5 (5th Cir. 1970); 6A Moore's Federal Practice ¶ 60.03[9] (2nd ed. 1971). A reasonable time might be judged by the thirty-day period in which a party must file a notice of appeal under Rule 4(a) of the Federal Rules of Appellate Procedure.

The order of the district court denying appellants' motion to vacate is reversed.

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[1] In *Weedon* v. *Gaden*, 419 F.2d 303 (D.C. Cir. 1969), appellant moved on September 12, 1967, to vacate a default judgment entered seven years earlier. This motion was denied on November 17, 1967, but none of the parties received notice of the order denying the motion. On January 19, 1968, appellant learned of the order. He filed a motion to vacate on January 24. The motion was denied on February 13. On March 18, he filed a notice of appeal from the order of February 13. He did not seek a thirty-day extension of time within which to appeal. Fed. R. Civ. P. 73(a) (1968); *see* Fed. R. App. P. 4(a). Since the notice of appeal was filed more than thirty days after the entry of the order from which the appeal was taken, this court did not have jurisdiction over the appeal. *Randolph* v. *Randolph*, 198 F.2d 956 (D.C. Cir. 1952). The comments on the use of Rule 60(b) to preserve the right to appeal are therefore dicta.